



Real Estate Law

By Mark McPherson

*T*he 80th Legislature passed 231 bills affecting real estate, lending, and other commercial matters that were included in the final report of the Real Estate Legislative Affairs Committee (RELACs), a standing committee of the State Bar Real Estate, Probate, and Trust Law Section (REPTL). Generally, these bills “tweaked” the law as opposed to enacting larger changes. Unfortunately, for some practitioners, “the devil’s in the details.”

ABOVE

*South Lobby (Public Corridor), Courtesy of the State Preservation Board, Austin, Texas.
Photographer Eric Beggs, P7.C2b #3, 3/96*

RESIDENTIAL REAL PROPERTY

H.B. 271 adds yet another check-box to the required "seller's disclosure of property condition" upon sale of residential real estate, indicating whether or not the property was previously used for the production of methamphetamine. This is not an attempt to punish the owner but rather a safety measure to protect persons unusually susceptible to air contamination.

H.B. 2207 affects residential sales transactions involving real property transferred subject to a lien. This new law is best characterized as an attempt at lender and buyer fraud protection. It does, however, get this writer's "Half Baked Award" for the session. H.B. 2207 requires sellers of residential real property transferred subject to a lien to provide a written notice to buyers and lenders, with 11 specified exceptions. The notice is set by the new statute, and basically describes the property, the debt owed on the property, the lien on the property, and includes a warning about the potential risks of purchasing property subject to an outstanding lien. Unless exempted by the statute, the seller must provide this notice to all lenders of record and the buyer at least seven days prior to closing. If notice is not timely provided, the buyer can terminate the contract for any reason within seven days of receiving the notice.

There is no remedy provided to lenders who fail to receive the notice, and the statute specifically provides that it does not affect conveyances. This leaves unanswered the question of what happens if the profiteer successfully conveys the property before the buyer or a lender determines they are entitled to this notice. Legislators may revisit the statute to more completely bake this idea.

Another new anti-fraud bill affecting residential real property is **H.B. 716**, which adds new sections to the Finance Code. Lenders, mortgage bankers, or licensed mortgage brokers must provide a prescribed notice to applicants for home loans that advises the applicant of the consequences of making false or misleading written statements to obtain property or credit. Failure to do so does not affect the validity or enforceability of a loan. This bill also establishes a Residential Mortgage Fraud Task Force to gather information about residential mortgage fraud and report to future legislatures, which presumably will enact further anti-fraud measures.

LANDLORD/TENANT

Two bills passed affecting the landlord/tenant relationship; both are very pro-tenant. **H.B. 177** requires a residential landlord to provide residential tenants with a device to supply hot water at a minimum temperature of 120 degrees Fahrenheit and requires a residential landlord to make a diligent effort to repair or remedy any condition affecting this hot-water device.

H.B. 3101 is a very comprehensive revision to residential leasing. Any lawyer practicing in this area should read the entire bill. In many instances, it requires landlords to use writ-



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ten leases in order to be able to use traditional remedies. The bill restricts the information a landlord can require about a tenant's vehicle, adds new restrictions on late fees, requires landlords to timely advise potential tenants about their application acceptance policies, requires landlords to take certain actions to address and resolve needed repairs, and affects the landlord's ability to lock tenants out.

The bill excuses tenants from the duty to know the law and instead requires landlords to notify tenants of specific portions of the law as a precondition to enforcing it. This is a dangerous precedent in this writer's opinion.

CONSTRUCTION

H.B. 1038 significantly amended the Texas Residential Construction Commission (TRCC) statute with a series of pro-consumer changes. Sellers of residential real property not subject to TRCC regulation must add notice of such status to the sales contract. Contracts for improvements to an existing residence must have new required provisions, and alternative dispute resolution provisions are subject to specific formatting requirements. Builders must have new home projects inspected at three different times — foundation, framing, and substantial completion. TRCC now has the power to issue notice of any violations of the TRCC Act and to enforce its provisions with administrative and monetary sanctions. Any owner of more than 50 percent of a "builder" is jointly and severally liable for TRCC monetary obligations. In what appears to be market-based discipline, TRCC must provide the public with more information about complaints and sanctions against builders.

EMINENT DOMAIN

The Legislature continued to grapple with the fallout of the U.S. Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). **H.B. 1495** directs the attorney general to draft a "Bill of Rights" to be delivered to affected property owners by the condemnation authority at the outset of the condemnation process. Landowners have the right to (1) notification of the proposed acquisition of the owner's property; (2) a bona fide good faith effort to negotiate by the entity proposing to acquire the property; (3) an assessment of damages to the owner that will result from the taking of the property; (4) a hearing under Chapter 21, Property Code, including a hearing on the assessment of damages; and (5) an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages.

To illustrate the full breadth of the Legislature's concern with condemnation, **H.B. 385** eliminates the eminent domain powers of the Commission of Control for Texas Centennial Celebrations, which appears to have completely ceased operations in 1940. Of course, the agency itself was not abolished.

H.J.R. 30 authorizes a governmental entity to sell real property acquired through eminent domain to the person (or to the person's heirs, successors, or assigns) who owned the real property interest immediately before the governmental entity acquired the property interest, at the price the entity paid at the time of acquisition (rather than the property's fair market value) if the public use for which the property was acquired through eminent domain is canceled, no actual progress is made toward the public use during a prescribed period of time, or the property is unnecessary for the public use. This is a proposed Constitutional amendment subject to passage in the November election.

FORECLOSURE

The Legislature made it easier to foreclose on a property and clarified other foreclosure processes by passing **H.B. 2738**. If a courthouse or county clerk's office is closed due to inclement weather, a natural disaster, or other act of God, the notice required to be posted at the courthouse or filed with the county clerk may be posted or filed up to 48 hours after the courthouse or county clerk's office reopens for business. More than one person may be named as trustee in a deed of trust, but a trustee may not be given any duties other than to conduct the foreclosure sale and is now expressly by statute not a fiduciary of either the mortgagee or mortgagor. Finally, H.B. 2738 clarifies that the purchase price is due immediately upon the close of the sale.

LIENS ON HOMESTEAD

S.B. 512 is designed to facilitate residential sales closings. It addresses the situation where a judgment debtor landowner seeks to sell his or her homestead. The bill provides a procedure by which a landowner completes an affidavit designating the homestead. This notice must be filed in the real property records and provided to each lender of record. Each lender has a certain time period in which to file a counter affidavit to challenge the accuracy of the judgment debtor's affidavit. If a countering affidavit is not timely filed, the lien is automatically removed from the designated homestead by operation of law, thus clearing the way for the title company to remove the judgment lien from the title commitment.

CIVIL PRACTICES AND REMEDIES CODE (CPRC)

Several changes to the CPRC will affect real estate practitioners. **H.B. 1781** establishes a new two-year statute of limitations to recover real property based on defects in recorded instruments. **H.B. 1787** adds boundary line disputes to the list of actions included in the Declaratory Judgment Act. **H.B. 1551** strengthens the remedies for nuisances. Aggrieved parties may seek a court order that includes reasonable requirements to prevent the use or maintenance of a nuisance, such as ordering

the cessation of utility service, limiting the hours of operation, or ordering landlords to terminate a lease in certain circumstances.

PRIVACY

The multitude of privacy laws the Legislature passed during its past several sessions finally intersected with access to public documents. **H.B. 2061** provides a specific process for individuals to identify documents filed in county clerk offices and requires county clerks to redact certain identifying information from those documents. It then exempts county clerks from civil and criminal liability for not redacting private information from all other public documents. Effective March 28, 2007, **H.B. 2061** changed the content of the notice of privacy rights on deeds for the third time.

MARGIN TAX

The completely new and radically different margin tax, originally enacted by **H.B. 3** in the 79th Legislature's third called session, was amended this session. The margin tax affects the real estate industry significantly because of the number of "single purpose entities" and limited partnerships established to avoid state and local taxation.

H.B. 3928 closes the "limited partnership loophole" created by **H.B. 3** so limited partnerships now compute their "total revenue from entire business" the same as other entities. **H.B. 3928** also changes the definition of "combined group" to taxable entities that are affiliated (now defined as entities with one or more common owners of more than 50 percent, instead of equal to or more than 80 percent) and engaged in a "unitary business." Prior law defined a "unitary business" as a group of affiliated entities that were vertically integrated, and horizontally integrated, and sharing centralized management, which produced a synergistic effect for the entities. **H.B. 3928** changed "and" to "or" so that any one of these tests may place entities in "combined groups." Being a "combined group" will generally raise the amount of tax owed.

A more detailed discussion of the margin tax is beyond the scope of this article, but in this writer's opinion, this is the most important bill passed this session affecting real estate. For additional resources, download "Advising Business Owners About the Margin Tax" at www.mctextlaw.com/2007legislation.asp.

MISCELLANEOUS

S.B. 1153 authorizes title insurance for personal property and fixtures. **S.B. 914** makes many changes to the Texas Real Estate Commission's rules and procedures for consumers and regulated brokers. **H.B. 3**, **H.B. 4**, and **S.B. 3** — the "water trifecta" — received considerable press during the session and may affect future water permitting and use. These bills also increase the importance of conservation in future water plans.

The 80th legislative session's new laws affect different real estate industry constituencies in very different ways. Many bills pitted the various real estate special interests, which have historically been aligned, against one another. As a result, real estate issues were unusually contentious and controversial this session.


This article is not an exclusive list of bills affecting certain areas of real estate law. Readers should not rely on these summaries to provide advice to clients or for their own use. Interested attorneys should always review the entire bill before providing such advice. Full texts of all bills considered in the 80th Legislature's regular session may be found at www.legis.state.tx.us/. The final RELACs report may be downloaded at www.reptl.org.

MARK MCPHERSON

is a sole practitioner in Dallas. He is chair of the Real Estate Legislative Affairs Committee of the State Bar Real Estate, Probate, and Trust Law Section.

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